Supreme Court, U.S.
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No.

In The

# Supreme Court of the United States

October Term, 1998

ROSCOE R. BEATY,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## PETITION FOR WRIT OF CERTIORARI

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37 pp

## QUESTION PRESENTED FOR REVIEW

Whether the imposition of exponentially higher occupational and wagering taxes on a gambler in a State which criminalizes gambling constitutes a punishment within the meaning of the Double Jeopardy Clause, thus precluding a subsequent Federal criminal prosecution for the illegal gambling previously taxed?

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Petitioner Roscoe R. Beaty respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at *United States v. Beaty*, 147 F.3d 522 (6th Cir. 1998). (App. A). The opinion of the district court in *United States v. Beaty*, No. 3-95-00024 (M.D. Tenn. 1997) is not reported. (App. B).

## STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit ("Court of Appeals") was entered on July 1, 1998. The Court of Appeals denied a timely petition for rehearing and for rehearing *en banc* August 13, 1998. (App. C). This petition for writ of certiorari was filed within 90 days of the denial of rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."

26 U.S.C. § 4401 provides:

Imposition of tax

(a) Wagers. —

(1) State authorized wagers. — There shall be imposed on any wager authorized under the law of the State in which accepted an excise tax equal to 0.25 percent of the amount of such wager.

(2) Unauthorized wagers. — There shall be imposed on any wager not described in paragraph (1) an excise tax equal to 2 percent of the amount of such wager.

(b) Amount of wager. — In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax. — Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

26 U.S.C. § 4411 provides:

Imposition of tax

(a) In general. — There shall be imposed a special tax of $500 per year to be paid by each person who is liable for the tax imposed under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

(b) Authorized persons. — Subsection (a) shall be applied by substituting "$50" for "$500" in the case of —

(1) any person whose liability for tax under section 4401 is determined only under paragraph (1) of section 4401(a), and

(2) any person who is engaged in receiving wagers only for or on behalf of person described in paragraph (1).

## STATEMENT OF THE CASE

In 1975, pursuant to 26 U.S.C. § 4401 *et seq.*, Petitioner Roscoe R. Beaty (hereafter "Petitioner" or "Mr. Beaty") registered with the Internal Revenue Service (IRS) as a wagerer and began paying occupational and wagering taxes. Annually, Petitioner purchased a "gambling stamp" for $500 (the occupational tax). In addition, Petitioner filed monthly wagering returns (the wagering tax). Based on Petitioner's personal records and information provided to Petitioner by the IRS, between 1975 and 1993 Petitioner paid occupational and wagering taxes exceeding $83,690. On August 23, 1995, the government filed a Superseding Indictment charging Petitioner

with operating an illegal gambling business, in violation of 18 U.S.C. § 1955 and 18 U.S.C. § 2, and conspiracy, in violation of 18 U.S.C. § 371.

Petitioner's jury trial began on November 5, 1996, before the Honorable John T. Nixon, United States District Judge, in the Middle District of Tennessee, Nashville Division. The Court declared a mistrial on November 15, 1996 after the jury was unable to reach a verdict.

On May 15, 1997, Petitioner filed a Motion to Dismiss the Superseding Indictment on Double Jeopardy Grounds. Judge Nixon denied the motion on August 6, 1997. On August 11, 1997, Petitioner filed a timely notice of appeal to the United States Court of Appeals for the Sixth Circuit under 28 U.S.C. § 1291, challenging the denial of the motion to dismiss on double jeopardy grounds.

## REASON FOR GRANTING THE WRIT

### I.

### THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS FOR THE SIXTH CIRCUIT DECIDED AN IMPORTANT CONSTITUTIONAL QUESTION IN A MANNER THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

Petitioner submits that the Court of Appeals' decision is contrary to the letter and spirit of *Montana Dept. of Revenue v. Kurth Ranch*, 114 S. Ct. 1937 (1994); *United States v. Hudson*, 522 U.S. 93 (1997); *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968); and, *United States v. Martin*, 95 F.3d 406 (6th Cir. 1996).

This appeal presents a critical issue arising out of the decision of the United States government to compel, with threat of prosecution, an inherently suspect group (gamblers accepting wagers in violation of state and/or federal law) to register with the Internal Revenue Service, pay a special occupational license tax and file wagering returns, then indict and prosecute the gambler based on his occupation of accepting illegal wagers. This case is *sui generis*. Legislative history and case law reveal that the grossly inflated tax on illegal wagers prescribed by 26 U.S.C. § 4401 is a "punishment" for double jeopardy purposes and any subsequent punishment for the same acts or conduct is a violation of the Fifth Amendment of the United States Constitution.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution

> protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and *multiple punishments for the same offense*.

*United States v. Halper*, 490 U.S. 435, 440 (1989) (emphasis added); *see United States v. Ursery*, 59 F.3d 568, 571 (6th Cir. 1995). In *Halper*, the Court considered "whether and under what circumstances a civil penalty may constitute 'punishment' for the purposes of double jeopardy analysis." 490 U.S. at 436. In addressing this issue, the Court focused on the underlying nature of the sanction and found that a legislature's description of a statute as civil does not make it such:

> [T]he labels "criminal" and "civil" are not of paramount importance. It is commonly understood

> that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties.

*Id.* at 447; *see Martin*, 95 F.3d at 408. The Sixth Circuit concluded that if a "civil" sanction serves a retributive or deterrent purpose, it is "punishment" and double jeopardy attaches. *Id.*; *see United States v. Alt*, 83 F.3d 779, 781 (6th Cir. 1996).

The Court has held that a tax may be punitive for double jeopardy purposes. In 1931, the Court examined a tax on illegal retail liquor sales, holding that the tax was, in fact, a penalty on selling liquor during Prohibition. The Court said that

> [n]o mere exercise of the art of lexicography can alter the essential nature of an act or a thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such.

*United States v. La Franca*, 282 U.S. 568, 572 (1931). In 1994, the Court expanded on *La Franca*, finding that "a tax is not immune from double jeopardy scrutiny simply because it is a tax." *Montana Dept. of Revenue v. Kurth Ranch*, 511 U.S. __, 128 L. Ed. 2d 767, 779, 114 S. Ct. 1937 (1994). In *Kurth Ranch*, the Court held that a Montana tax on the possession and storage of dangerous drugs was punitive for double jeopardy purposes. *Id.* at 781.

The United States Congress passed the original tax on wagers as part of the Revenue Act of 1951. Although the tax has faced several amendments over the years, the current

version is very similar to the original.[1] The current wagering tax states in part:

> § 4401. Imposition of tax
>
> (a) Wagers —
>
> (1) State authorized wagers — There shall be imposed on any wager authorized under the law of the State in which accepted an excise tax equal to 0.25 percent of the amount of such wager.
>
> (2) Unauthorized wagers — There shall be imposed on any wager not described in paragraph (1) an excise tax equal to 2 percent of the amount of such wager.

26 U.S.C. § 4401 (1996). In addition, a person accepting illegal wagers must register with the Internal Revenue Service and pay an occupational tax of $500 per year; however, a person who legally accepts wagers is subject to an annual occupational tax of only $50. 26 U.S.C. § 4411.

Although § 4401 is expediently labeled a "tax," legislative history reveals that the true purpose of the measure was to deter and penalize wagering. On June 18, 1951, the House of Representatives discussed the new tax on wagers. Congressman Hoffman of Michigan asked: "Properly considered, then, it would be a sort of additional penalty on those unlawful activities, would it not?" Congressman Cooper, Chairman of

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1. The original tax on wagers was found in section 3285 of the Internal Revenue Code of 1939. The same tax was carried forward in the Revenue Act of 1954 as section 4401 of the Internal Revenue Code of 1954.

the House Ways and Means Committee, replied that taxing the wagers did not amount to "implied authorization to carry on illegal activities." Congressman Hoffman responded, "[t]hen I will renew my observation that it might if properly construed be considered an additional penalty on the illegal activities," to which Congressman Cooper replied "[c]ertainly, and we might indulge the hope that the imposition of this type of tax would eliminate that kind of activity." 97 Cong. Record 6892, H.R. Rep. No. 586, 82nd Cong., 1st Sess. 1951, 1951 U.S.S.C.A.N. 1781; *See United States v. Kahriger*, 345 U.S. 22, 27 (1953).

In *Kahriger*, the Court held that the wagering tax was not an unconstitutional regulation of matters within the exclusive power of the states.[2] Justice Frankfurter dissented, stating that

> [w]hat is relevant to judgment here is that, even if history of this legislation as it went through Congress did not give one the libretto to the song, the context of the circumstances which brought forth this enactment — sensationally exploited disclosures regarding gambling in big cities and small, the relation of this gambling to corrupt politics, the impatient public response to these disclosures, the feeling of ineptitude or paralysis on the part of local law-enforcing agencies — emphatically supports what was revealed on the floor of Congress, namely, that what was formally a means of raising revenue for the Federal Government was essentially an effort to check if not to stamp out professional gambling.

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2. In this case, the Petitioner is not questioning the validity of the wagering tax, but arguing that it constitutes "punishment" for double jeopardy purposes.

345 U.S. at 38-39. Justice Frankfurter believed that "Congress wrapped the legislation in the verbal cellophane of a revenue measure." *Id.* at 38. Justice Jackson agreed with this assessment, writing in a concurring opinion that the

> [wagering tax] is difficult to regard as a rational or good-faith revenue measure, despite the deference that is due Congress. On the contrary, it seems to be a plan to tax out of existence the professional gambler whom it has been found impossible to prosecute out of existence.

*Id.* at 35.

Clearly, the legislative history and case law of the period reveal that Congress intended the wagering tax to punish gamblers and deter illegal wagering. One court has noted that the tax "was the intent of Congress to attempt to solve a national social problem as well as raise revenue" and "suppress wide-spread, nation-wide, illegal gambling activities being carried on in violation of the criminal laws of the several states." *D.I. Operating Co. v. United States*, 239 F. Supp. 78, 82-83 (D. Nev. 1965).

The punitive intent of § 4401 is also evident in the language of the statute itself. "State authorized wagers" are taxed at a rate of 0.25%, while "unauthorized wagers," that is, illegal wagers, are taxed at a rate 800% greater.[3] Similarly, individuals who legally accept wagers pay an annual occupational tax of

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3. Before 1982, all wagers were taxed at the higher rate. In 1982 Congress reduced the tax on legal wagers to 0.25% and lowered the occupational tax on legal wagerers to $50, but stated "in states where wagering is illegal, the two-percent excise tax and $500 occupational tax will continue to apply." H.R. Conf. Rep. No. 929, 97th Cong., 2nd Sess. 1982.

$50, while illegal wagerers are subject to a tax 1000% greater. If the purpose of the tax is only to raise revenue, and not to punish and deter illegal wagers, then why are illegal wagers taxed at a higher rate than legal wagers?

In *Kurth Ranch*, the Court noted that "a high tax rate and deterrent purpose" support the characterization that a tax is a punishment for double jeopardy purposes. 128 L. Ed. 2d at 779. The Court added, however, that "these features, in and of themselves, do not necessarily render the tax punitive." *Id.* In holding that Montana's drug tax was punitive, the Court noted an "unusual feature," that "this so-called tax is conditioned on the commission of a crime." *Id.*

Similarly, the wagering tax found in § 4401(a)(2) is conditioned on the commission of a crime.[4] By definition, one

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4. In 1968, the Court's decisions in *Marchetti v. United States*, 390 U.S. 39 (1968) and *Grosso v. United States*, 390 U.S. 62 (1968), curtailed the effect of the wagering tax statutes on illegal gambling operations by limiting the statutes' registration requirements on Fifth Amendment grounds. *Marchetti* involved a conviction for conspiring to evade the fifty dollar occupational tax on persons in the business of accepting wagers, failing to pay the tax, and failing to comply with registration requirements. Noting that all states except Nevada had broad penal provisions against gambling and that the registration information was readily available to local authorities, the Court held that: "[T]hese provisions may not be employed to punish criminally those persons who have defended a failure to comply with their requirements with a proper assertion of the privilege against self-incrimination" *Id.* at 42. The Court insisted that its holding did not limit the right to tax illegal enterprises, but was confined strictly to the scope of the fifth amendment privilege. *Id.* at 51.

*Grosso* extended the *Marchetti* holding by applying it to a conviction for failure to pay the 10% excise tax. The Court noted that

(Cont'd)

cannot conduct unauthorized wagers without committing a crime. If the wager is authorized, i.e. legal, it is taxed at the lower rate under § 4401(a)(1). The tax on illegal wagers is not a legitimate revenue-raising measure. The normal justifications for taxing a disfavored activity

> vanish when the taxed activity is completely forbidden, for the legitimate revenue-raising purpose that might support such a tax could be equally well served by increasing the fine imposed upon such conduct.

*Id.* at 780. Illegal wagers are completely forbidden, and a fine on such wagers could raise as much if not more revenue than the current so-called tax.

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(Cont'd)
the IRS's practice of releasing to local authorities information obtained in enforcing excise tax raised equally serious self-incrimination problems. *Id.* at 66. The Court left it to Congress to decide how to isolate the wagering information from potential gambling prosecutions and consequent Fifth Amendment problems.

In 1974, Congress enacted 26 U.S.C. § 4424 to resolve the concerns raised by *Grosso* and *Marchetti*. Title 26, United States Code, Section 4424 provides that no Treasury Department official or employee may disclose, except in connection with the administration of or the civil or criminal enforcement of internal revenue taxes, any document, record, or other information supplied by a taxpayer in connection with such taxes. Under 26 U.S.C. § 4424, the IRS may not disclose information on such a return subject to criminal sanctions under 26 U.S.C. § 7213(a)(1). Hence, the disclosure of information by a gambler to the IRS is statutorily compelled by the government under its revenue scheme, is a record of criminal activity, and when this information is used in the prosecution of non-revenue related crimes, it constitutes compelled incrimination prohibited by the Fifth Amendment. *See United States v. Haydel*, 649 F.2d 1152 (5th Cir. 1981).

On occasion, the noble intentions of Congress run counter to the interests of justice. When this occurs, courts must look beyond the language and intentions that camouflage Congress' true purpose.[5] Although expediently labeled a "tax," the penalty on wagering is "punishment" for double jeopardy purposes, and any subsequent punishment for the same acts or conduct violates the Fifth Amendment to the United States Constitution.

## CONCLUSION

For reasons stated herein, the Petitioner respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

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5. As Judge Learned Hand observed in 1926, "there is no surer sign of a feeble and fumbling law than timidity in penetrating the form to the substance." *Loubriel v. United States*, 9 F.2d 807, 808 (2nd Cir. 1926).

# APPENDIX

**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED JULY 1, 1998**

# UNITED STATES COURT OF APPEALS

## FOR THE SIXTH CIRCUIT

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UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

*v.*

ROSCOE R. BEATY,
*Defendant-Appellant.*

No. 97-6007

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 95-00024--John T. Nixon, Chief District Judge.

Argued: April 22, 1998

Decided and Filed: July 1, 1998

Before: KENNEDY and BATCHELDER, Circuit Judges;
HULL, District Judge.*

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* The Honorable Thomas Gray Hull, United States District Judge for the Eastern District of Tennessee, sitting by designation.

*Appendix A*

## COUNSEL

**ARGUED:** Peter J. Strianse, TUNE, ENTREKIN & WHITE, Nashville, Tennessee, for Appellant. William Cohen, OFFICE OF THE U.S. ATTORNEY, Nashville, Tennessee, for Appellee. **ON BRIEF:** Peter J. Strianse, TUNE, ENTREKIN & WHITE, Nashville, Tennessee, for Appellant. William Cohen, OFFICE OF THE U.S. ATTORNEY, Nashville, Tennessee, for Appellee.

## OPINION

KENNEDY, Circuit Judge. Defendant Roscoe R. Beaty was indicted for illegal gambling, in violation of 18 U.S.C. § 1955 and § 2, and conspiracy to commit illegal gambling, in violation of 18 U.S.C. § 371. He was tried on the charges, but the court declared a mistrial and eventually scheduled the case for retrial. Beaty subsequently filed a motion to dismiss the indictment on double jeopardy grounds, which the District Court denied. Beaty now appeals the denial of the motion to dismiss the indictment.

## I. FACTS

In 1975, Defendant Roscoe R. Beaty registered with the Internal Revenue Service ("IRS") as a wagerer and began paying occupational and wagering taxes pursuant to 26 U.S.C. §§ 4401, 4411.[1] Beaty annually purchased a "gambling

[1] Section 4401 provides:

**Imposition of tax**

(a) **Wagers.—**

(1) **State authorized wagers.—** There shall be imposed on any wager authorized under the law of the State in which accepted an excise tax equal to 0.25 percent of the amount

stamp" in the amount of $500 (the occupational tax). In addition, Beaty filed monthly wagering returns (the wagering

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of such wager.

(2) **Unauthorized wagers.**— There shall be imposed on any wager not described in paragraph (1) an excise tax equal to 2 percent of the amount of such wager.

(b) **Amount of wager.**— In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) **Persons liable for tax.**— Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

Section 4411 provides:

**Imposition of tax**

(a) **In general.**— There shall be imposed a special tax of $500 per year to be paid by each person who is liable for the tax imposed under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

(b) **Authorized persons.**— Subsection (a) shall be applied by substituting "$50" for "$500" in the case of—

(1) any person whose liability for tax under section 4401 is determined only under paragraph (1) of section 4401(a), and

(2) any person who is engaged in receiving wagers only for or on behalf of person described in paragraph (1).

tax). Between 1975 and 1993, Beaty paid occupational and wagering taxes exceeding $83,690.

On August 23, 1995, the government filed a superseding indictment charging Beaty with operating an illegal gambling business, in violation of 18 U.S.C. § 1955 and 18 U.S.C. § 2, and conspiracy, in violation of 18 U.S.C. § 371.

Beaty's jury trial began on November 5, 1996 but ended in a mistrial on November 15, 1996 because the jury was unable to reach a verdict. The District Court scheduled a retrial for August 12, 1997.

On May 15, 1997, Beaty filed a motion to dismiss the superseding indictment on double jeopardy grounds. The District Court denied the motion in a memorandum opinion filed on August 6, 1997. On appeal, Beaty challenges the denial of the motion.

## II. DISCUSSION

The District Court's decision to deny the motion to dismiss on grounds of double jeopardy is a conclusion of law which we review *de novo*. *United States v. Ursery*, 59 F.3d 568, 570 (6th Cir. 1995), *rev'd on other grounds*, 116 S.Ct. 2135 ("This court reviews *de novo* the constitutional issue of double jeopardy.").

The Double Jeopardy Clause of the Fifth Amendment provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend V. This Clause prohibits "a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense." *Department of Revenue of Mont. v. Kurth Ranch*, 114 S. Ct. 1937, 1941 n.1. (1994). It has long been understood, however, that this Clause "does not prohibit the imposition of any additional sanction that could, 'in common parlance,' be described as punishment. The Clause protects only against the imposition of multiple *criminal punishments* for the same offense and

then only when such occurs in successive proceedings." *Hudson v. United States*, 118 S. Ct. 488, 493 (1997) (emphasis added) (internal citations omitted).

In this case, Beaty contends that the gambling and occupational taxes he paid annually constituted "criminal punishment" that "subject[ed him] to 'jeopardy' within the constitutional meaning" of that term. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 548-49 (1943). Therefore, Beaty argues, his subsequent indictment for accepting illegal wagers violates the Fifth Amendment.

Under certain circumstances, a civil penalty may constitute "punishment" for the purpose of double jeopardy analysis. *United States v. Halper*, 490 U.S. 435, 436 (1989). The Supreme Court has articulated the following analytical framework for determining whether a penalty, such as the occupational or wagering tax, is a form of "punishment":

> Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction. A court first must ask whether the legislature 'in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one or the other.' Even in those cases where the legislature 'has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect' as to 'transfor[m] what was clearly intended as a civil remedy into a criminal penalty.'

In making this latter determination, the factors listed in *Kennedy v. Mendoza-Martinez* provide useful guideposts, including: (1) '[w]hether the sanction involves an affirmative disability or restraint'; (2) 'whether it has historically been regarded as a punishment'; (3) 'whether it comes into play only on a finding of scienter'; (4) 'whether its operation will promote the traditional aims of punishment- retribution and deterrence'; (5) 'whether the behavior to which it applies is already a crime'; (6) 'whether an alternative purpose to which it may

> rationally be connected is assignable for it'; and (7) 'whether it appears excessive in relation to the alternative purpose assigned.' It is important to note, however, that 'these factors must be considered in relation to the statute on its face and 'only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.'

*Hudson*, 118 S. Ct. at 493 (internal citations omitted).

Applying these double jeopardy principles to the facts of this case, it becomes evident that criminally prosecuting Beaty would not violate the Double Jeopardy Clause. It is clear that Congress intended the occupational and wagering taxes to be civil in nature. Taxes, on their face, do not constitute criminal punishment. *See Kurth Ranch*, 114 S. Ct. at 1946. Thus, we must consider the factors endorsed in *Hudson* to determine whether these particular taxes constitute such a penalty. *Hudson*, 118 S. Ct. at 493; *Kurth Ranch*, 114 S. Ct. at 1946 (noting that "at some point, an exaction labeled as a tax approaches punishment," and the court's task is to determine whether a particular tax has crossed that line).

Consideration of these factors reveals little evidence, let alone the requisite clearest proof, that the taxes are "so punitive in form and effect as to render them criminal despite Congress' intent to the contrary." *Ursery*, 116 S. Ct. at 2148. First, taxes historically have not been viewed as punishment. *See Kurth Ranch*, 114 S. Ct. at 1946 ("Whereas fines, penalties, and forfeitures are readily characterized as sanctions, taxes are typically different because they are usually motivated by revenue-raising, rather than punitive, purposes."). *Cf. Hudson*, 118 S. Ct. at 495 (noting that money penalties historically not considered punishment). Second, the taxes imposed do not constitute an "affirmative disability or restraint," as that term is ordinarily understood. *Hudson*, 118 S. Ct. at 496. The imposition of taxes is "certainly nothing approaching the 'infamous punishment' of imprisonment." *Id.* quoting *Fleming v. Nestor*, 363 U.S. 603, 617 (1960).

Third, the conduct for which the taxes were imposed may also be criminal.[2] However, the gambling and occupational taxes are not conditioned on the commission of a crime; they are imposed on all wagers, legal and illegal. Moreover, the Government imposes the taxes on all wagers, irrespective of whether the wagerer has been arrested. *Cf. Kurth Ranch*, 114 S. Ct. at 1947-48 (finding that Montana's drug tax "departs so far from normal revenue laws as to become a form of punishment." The features of the tax which led the Court to this conclusion included the facts that the tax was conditioned on the commission of a crime, the tax was enacted only after the taxpayer had been arrested for the same conduct that formed the basis of the tax obligation, and persons who were arrested for possessing drugs constituted the entire class of taxpayers subject to the tax.). Even in the absence of these mitigating features, the fact that the taxed conduct may also be criminal would be insufficient to render the tax criminally punitive, particularly in the double jeopardy context. *See Hudson*, 118 S. Ct. at 496; *Ursery*, 116 S. Ct. at 2149; *Kurth Ranch*, 114 S. Ct. at 1945 ("As a general matter, the unlawfulness of an activity does not prevent its taxation."); *United States v. Dixon*, 113 S. Ct. 2849, 2860 (1993) (rejecting "same-conduct" test for double jeopardy purposes).

Fourth, the gambling and occupational taxes can be characterized as mixed motive taxes: motivated by both a desire to raise revenue, and to deter illegal gambling. *United States v. Kahringer*, 73 S. Ct. 510, 513 (1953), *rev'd on other grounds, Marchetti v. U.S.*, 88 S.Ct. 697 (1968). "But the mere presence of [a deterrent] purpose is insufficient to render a sanction criminal, as deterrence 'may serve civil as well as criminal goals.'" *Hudson*, 118 S. Ct. at 494 (noting also that "all civil penalties have some deterrent effect"); *see also Ursery*, 116 S. Ct. at 2138; *Kurth Ranch*, 114 S. Ct. at 1946 (cautioning "against invalidating a tax simply because its enforcement might be oppressive or because the legislature's motive was somehow suspect").

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[2] Indeed, it formed the basis for Beaty's indictment.

Finally, the taxes were not excessive in relation to their revenue-building purpose. The gambling tax here was imposed at a rate of two percent of gross wagers. This Court has held that much greater taxes and penalties do not amount to punishment for double jeopardy purposes. *See, e.g., United States v. Martin*, 95 F.3d 406 (6th Cir. 1996) (finding over-quota marketing penalty of seventy-five percent does not amount to punishment); *United States v. Alt*, 83 F.3d 779 (6th Cir. 1996) (holding civil fraud penalty averaging eighty-one cents for each dollar of tax owed does not constitute punishment); *Yarborough v. United States*, 955 F. Supp. 727, 730 (S.D. Tx. 1996) (finding ten percent tax on wagering is not sufficiently high to constitute a penalty).

In sum, there is very little evidence, let alone the 'clearest proof,' that the occupational and wagering taxes constitute criminal punishment. The Double Jeopardy Clause therefore poses no obstacle to the trial on the pending indictment.

## III. CONCLUSION

For all of the foregoing reasons, the decision of the District Court is **AFFIRMED.**

## APPENDIX B — MEMORANDUM-OPINION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION ENTERED AUGUST 6, 1997

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3-95-00024
Judge Nixon

UNITED STATES OF AMERICA

v.

ROSCOE R. BEATY

### MEMORANDUM-OPINION

Currently pending before this Court is the Defendant's Motion to Dismiss the Superseding Indictment on Double Jeopardy Grounds (Doc. 205). For the reasoning set forth below, the Defendant's Motion to Dismiss is hereby DENIED.

The Defendant was indicted for conspiracy and conducting an illegal gambling business. The Defendant has moved that the superseding indictment against him be dismissed based on the Double Jeopardy Clause of the Fifth Amendment of the Constitution. The Fifth Amendment provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb" U.S. Const. amend. V. The Double Jeopardy Clause prohibits multiple punishments for the same offense. *United States v. Halper*, 490 U.S. 435, 440 (1989). Essentially, the Defendant contends that the gambling and

occupational taxes which he paid constitutes punishment under the Double Jeopardy clause.

The Supreme Court determined when a tax is subject to the double jeopardy clause in *Department of Revenue of Montana v. Kurth Ranch*, 114 S.Ct. 1937 (1994). In *Kurth Ranch*, the Court held that the Montana Dangerous Drug Tax was a form of punishment. The Government has responded that the drug tax in the *Kurth Ranch* case is vastly different from the gambling tax system in the current case. The Court agrees with the Government's position; however, the reasoning in *Kurth Ranch* is controlling. In deciding whether the superseding indictment is a form of double jeopardy the Court must consider whether the gambling and occupational tax constitutes a form of punishment. *Kurth Ranch*, 114 S.Ct. at 1945. A tax is considered punishment if it has a punitive, retributive or deterrent purpose, or is excessively disproportional to the government's cost of recovering a loss. *United States v. Martin*, 95 F.3d 406, 408 (6th Cir. 1996). The gambling and occupational tax in this case can be characterized as a mixed motive tax. A review of the relevant legislative history indicates that the tax was motivated by both a desire to raise revenue, and to deter illegal gambling. The Court in *Kurth Ranch* concluded that the revenue raising purpose in a mixed motive tax vanishes when the taxed activity is completely forbidden. *Kurth Ranch* 114 S.Ct. at 1947. The deterrent purpose of the gambling tax suggest that it could be considered punishment.

An additional consideration in deciding whether a tax is punitive is the rate of tax. *Id.* The Defendant has argued that a comparison of the tax imposed upon authorized and unauthorized wagers is evidence of the punitive intent of the tax. The Supreme Court has clearly stated that neither a high

rate of taxation nor an obvious deterrent purpose automatically marks a tax as a form of punishment. *Id.* at 1946-47. The tax in Montana was considered exceptional. In concluding that the drug tax was a form of punishment, the Supreme Court looked beyond the high tax rate and deterrent purpose. The fact that the drug tax in *Kurth Ranch* was not assessed until after arrest, and was conditioned on the commission of a crime was a significant consideration in the Court's decision. It is at this point, that the tax involved in *Kurth Ranch* and the tax in this case vastly differ.

The gambling and occupational tax in this case, is not conditioned on the commission of a crime. The tax is imposed on all wagers, legal and illegal. The Government has imposed the gambling tax annually, on all wagers, regardless of whether they have been arrested. Furthermore the drug tax in *Kurth Ranch* was imposed when the taxpayer did not own or possess the taxed item. When the Defendant was taxed, he was in possession of the proceeds from his illegal gambling business. The tax involved in *Kurth Ranch* was unique and characterized as a "concoction of anomalies". *Id.* at 1948. Although the gambling tax in this case has some punitive characteristics, the Court is not persuaded that it rises to the level of punishment for double jeopardy analysis. Accordingly, the Defendant's motion will be DENIED.

Entered this the 6th day of August, 1997

s/ John T. Nixon
JOHN T. NIXON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

## APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING FILED AUGUST 13, 1998

97-6007

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROSCOE R. BEATY,

Defendant-Appellant.

ORDER

**BEFORE:** KENNEDY and BATCHELDER, Circuit Judges; and HULL, *District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully

* Hon. Thomas G. Hull, United States District Judge for the Eastern District of Tennessee, sitting by designation.

considered upon the original submission and decision of the case. Accordingly, the petition is denied.

**ENTERED BY ORDER OF THE COURT**

s/ Leonard Green
**Leonard Green, Clerk**